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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO RUESGA, Defendant and Appellant.	B207659 (Los Angeles County Super. Ct. No. KA081324)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles E. Horan, Judge. Affirmed with modifications.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Guillermo Ruesga appeals from a judgment entered after a jury returned a guilty verdict against him on count 1,[1] vehicular burglary (Pen. Code, § 459).[2] The jury found true the allegations that appellant had served five prior prison terms within the meaning of section 667.5 and suffered one prior strike conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d) (the Three Strikes law).

The trial court sentenced appellant to the upper term of six years, plus five years for the five prior prison term enhancements, for a total of 11 years in state prison.

We affirm with modifications.

CONTENTIONS

Appellant contends that: (1) his sentence must be reduced by one year because the jury erroneously found that appellant had served two prior prison terms for case No. VA076987 and case No. KA024183; (2) the trial court erred in failing to sua sponte instruct on the lesser included offense of vehicle tampering; (3) the trial court committed judicial misconduct, denying him his rights to due process and a fair trial; and (4) the trial court erred in failing to instruct the jury with CALJIC No. 17.32.[3]

FACTS AND PROCEDURAL BACKGROUND

On November 29, 2007, at 5:00 p.m., Bernard Moorman (Moorman) arrived home. As usual, he looked over the truck that he kept parked on the street. It appeared completely intact. At 11:30 p.m., Los Angeles County Sheriff's Department deputies responded to a call of a vehicle theft in progress and drove up to appellant as he was

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[1] Count 2, petty theft with a prior theft-related conviction (Pen. Code, § 666) was dismissed.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] Appellant filed an in propria persona petition for habeas corpus on August 28, 2008, which we considered concurrently with the appeal.

leaning through the driver's side into Moorman's truck. When appellant noticed the officers, he appeared startled, got out of the truck, threw a blue baseball cap and a screwdriver onto the ground next to the truck's open door, and ran. The officers apprehended appellant and arrested him.

The ventilation window, a small six-inch by eight-inch window on the driver's side, had been shattered. The truck's ignition had been punched, in an attempt to expose the ignition so that it could be started without a key. The steering column and ignition had been broken, however, and the engine could not be started. During the booking search, tiny glass particles were found on appellant's hand and larger glass particles around his pant leg cuff. Appellant also had a pair of gloves and an exacto knife.

At trial, appellant testified that someone else opened Moorman's truck. After the person left, appellant fell asleep in the truck, woke up when the officers opened the door, and fell out of the truck and onto the ground.

DISCUSSION

I. One prior prison term enhancement shall be stricken

Appellant contends, and the People concede, that appellant served just one prior prison term for his convictions in case No. KA058892 and case No. VA076987 because the sentence in case No. VA076987 was ordered to run concurrently to the sentence in case No. KA058892. However, the trial court sentenced appellant to state prison for one year for each prior prison term enhancement. The record supports appellant's contentions and we conclude that one prior prison term enhancement should be stricken. (*People v. Jones* (1998) 63 Cal.App.4th 744, 746.)

II. The trial court was not required to instruct the jury that vehicle tampering was a lesser included offense of vehicular burglary

Appellant contends that the trial court should have, sua sponte, instructed the jury on the lesser included offense of vehicle tampering. We disagree.

A trial court is required to instruct the jury on a lesser included offense "whenever evidence that the defendant is guilty of only the lesser offense is substantial enough to merit consideration by the jury." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 414.)

"Substantial evidence in this context is that which a reasonable jury could find persuasive." (*Ibid*.)

Vehicular burglary occurs when a person enters a vehicle with the intent to steal. (§ 459.) Vehicle Code section 10852 defines vehicle tampering as willfully injuring or tampering with any vehicle or the contents thereof or breaking or removing any part of a vehicle without the consent of the owner. (*People v. Anderson* (1975) 15 Cal.3d 806, 810.) Vehicle tampering is a lesser included offense of vehicular burglary. (*Id*. at pp. 810-811.)

We find that the trial court was not required to instruct on vehicle tampering as a lesser included crime of vehicular burglary because the evidence supported either a conviction for vehicular burglary or that appellant committed neither vehicle tampering nor vehicular burglary. The People's theory was that appellant committed vehicular burglary and not vehicle tampering. According to the evidence presented by the People, appellant broke into a locked vehicle with the intent to steal it. The truck was intact when Moorman drove home at 5:00 p.m. Responding to a vehicle theft in progress call, the officers drove up to appellant, who was leaning into the truck through the door. When he noticed the officers, appellant dropped a baseball cap and screwdriver and ran. He was found with gloves and an exacto knife, and glass particles in his clothing and on his hand. The jury could infer that appellant broke the ventilation window in order to open the truck door from the inside, and that he intended to steal the vehicle, not merely tamper with it.

Appellant, on the other hand, testified that he merely fell asleep in the truck after someone else had opened the door. He claimed that he did not disturb anything. Under his version, there is no evidence supporting the theory that he committed vehicular burglary or vehicle tampering. Accordingly, appellant was not entitled to the lesser included instruction on vehicle tampering. (*People v. Mooney* (1983) 145 Cal.App.3d 502, 506 [trial court need not instruct on lesser included offense of vehicle tampering where the evidence would support only a verdict of guilt on the greater charge].)

In any event, any error was harmless because it is not reasonably probable the jury would have reached a different result if the instruction had been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence of appellant's guilt was overwhelming. As stated, the eyewitness evidence of the officers established that appellant was caught leaning into a truck, and that he tried to discard evidence and flee when he saw the police. The jury could infer that appellant had broken the window of the truck and attempted to steal it by punching the steering column. And, he was found with physical evidence of the break-in on his person.

Moreover, as stated, the evidence showed that appellant either burglarized the car or, if the jury chose to believe appellant's version, he committed no offense at all. Thus, even if the trial court had instructed on the lesser included offense, the jury would not have concluded that appellant was only guilty of vehicle tampering.

We conclude that the trial court did not err by failing to instruct, sua sponte, on the lesser included offense of vehicle tampering.

III. No judicial misconduct occurred

Appellant contends that the trial court committed judicial misconduct by making "intemperate commentary of appellant" and portraying him "as a manipulative liar and out-of-control" in violation of his rights to due process and a fair trial. We disagree and conclude that no judicial misconduct occurred.

We first note that appellant waived the issue of judicial misconduct on appeal by failing to raise the issue at trial. (*People v. Boyette* (2002) 29 Cal.4th 381, 458-459.) In any event, our review of the record shows that the trial court did not commit judicial misconduct. The trial court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause. (Cal. Const., art. VI, § 10.) But, the comments should be temperately and fairly made, rather than argumentative. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 822, 823). A reviewing court must "'evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.'" (*Id.* at p. 823.)

Our review of the record shows that the trial court's comments were not directed toward appellant's credibility, but were explanations to the jury of why it was admonishing appellant and removing him from the courtroom. The record shows that appellant engaged in gamesmanship prior to jury selection, requested new counsel prior to opening statements, argued with the trial court, smiled throughout the argument, refused to directly answer questions, and refused to change out of his jail attire. After both counsel made their opening statements, appellant loudly stated to his counsel: "Sit down. You ain't my attorney." The trial court asked appellant to whisper to his attorney. Out of the presence of the jury, appellant asked his attorney if he threatened him in front of the jury and if he said he was going to kick appellant's ass. The trial court stated (for the record) that appellant's trial counsel had not said anything about kicking anybody's ass, and that appellant was trying to disrupt the trial and influence the jury. Appellant continued to argue, stating that he was trying to be quiet, but his counsel had threatened to kick his ass.

During witness testimony, appellant spoke loudly to his counsel and stated that he was looking at 11 years, prompting an admonishment. The trial court stated that appellant was looking at "perhaps no time, a year, two years." The court then admonished the jury that appellant was trying to be manipulative, that the court had discussed appellant's behavior with him, and that appellant had attempted to suggest to the jury a possible sentence. The trial court asked the jury to disregard appellant's statements about the sentence and instructed appellant not to repeat his misbehavior. Appellant then stated "Your Honor, it's a Vehicle Code." The trial court then ordered appellant to be removed from the courtroom. After his removal, the trial court apologized to the jury, explained that appellant had been warned that he would be removed for misbehavior, and that appellant attempted to "sort of sabotage the proceedings." Appellant returned to the courtroom and outside the presence of the jury, was again admonished by the trial court to behave, to give responsive answers to his attorney's questions if he wished to testify, and not to shout or attempt to introduce prejudicial matter before the jury.

While being questioned during direct examination, appellant asked if he was looking at 11 years, tried to testify about the Vehicle Code, and asked if there was a charge called tampering with a vehicle, despite repeated admonitions by the trial court to stop talking out of turn. After the trial court ordered appellant to step down, appellant stated: "If they find me guilty of just sleeping in a car it's 11 years."

We conclude that the trial court's comments were not comments on appellant's credibility, but were explanations of why it admonished appellant and removed him from the courtroom. (*People v. Gutierrez, supra*, 45 Cal.4th at p. 823 [trial court's clarification of a prior ruling in contradiction of defendant's assertion, did not address defendant's credibility].) Even if we construe the comments as directed toward appellant's credibility, we cannot agree that appellant was deprived of his rights to due process and a fair trial. The jury was able to consider the testimony of appellant and his removal from the courtroom in light of the admonishment given by the trial court. The trial court instructed the jury to disregard appellant's outbursts and not consider his removal from the courtroom in reaching its verdict. We presume the jury followed the trial court's instructions. (*People v. Young* (2005) 34 Cal.4th 1149, 1214.)

We conclude the trial court did not commit judicial misconduct.

IV. The trial court was not required to instruct the jury with CALJIC No. 17.32

Appellant contends that the trial court was required to instruct the jury with CALJIC No. 17.32 because of its "many detractive attacks on appellant's credibility." We disagree.

The trial court instructed the jury with CALJIC NO. 17.30,[4] which instructs the jury that the trial court did not intend the jury to find that it believed or disbelieved any

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[4] CALJIC No. 17.30 provides: "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion."

witness and that it was to form its own conclusion. Appellant urges that the trial court should have instructed with CALJIC No. 17.32,[5] which warns in addition to the admonishment in CALJIC No. 17.30, that any comment on the evidence, the testimony, and the believability of the witness are advisory only, and that the jury is the exclusive judge of the facts and believability of the witnesses.

As stated, the trial court did not comment on the testimony and credibility of appellant and it was not required to give CALJIC No. 17.32. (Cf. *People v. Stewart* (1983) 145 Cal.App.3d 967, 978 [CALJIC No. 17.32 should have been given when the trial court commented that a witness was telling the truth].)

In any event, any error was harmless because it is not reasonably probable the jury would have reached a different result if the instruction had been given. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) With CALJIC No. 17.30, the trial court instructed the jury to disregard any intimation or suggestion as to what facts the jury should find and which witnesses to believe or disbelieve. And, the trial court's explanation to the jury of appellant's behavior and reason for removal was proper.

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5 CALJIC No. 17.32 provides: "I have not intended by anything I have said or done, or by any questions that I may have asked, to suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, disregard it and form your own conclusion. [¶] At this time, however, and for the purpose of assisting you in properly deciding this case, I will comment on the evidence and the testimony and believability of any witness. [¶] My comments are intended to be advisory only and are not binding on you as you must be the exclusive judges of the facts and of the believability of the witnesses. [¶] You may disregard any or all of my comments if they do not coincide with your views of the evidence and the believability of the witnesses."

DISPOSITION

The trial court is ordered to modify the judgment to strike one of the one-year enhancements imposed pursuant to section 667.5 and send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST